Supreme Court, U. S.
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No. 78-1475

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

JOHN W. PENCE, Petitioner

v.

HAROLD R. BROWN, Secretary of Defense, et al

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY STATEMENT

Respondents in their Brief suggest that Petitioner tendered one resignation which was not accepted and that at some time after his active duty date suit was filed. In reply, Petitioner would assert that on five (5) occasions, he attempted to resign (App. 15, 17, 22, 24 and 26) covering almost an entire year prior to his anticipated active duty date of July of 1978, as that date drew near, he filed an action in the United States District Court for the Southern District of Ohio, Civil No. 1-78-405 in June, 1978. The District Court of Ohio was not satisfied with its jurisdiction and Petitioner, therefore, began the instant action in the proper district court below. Petitioner attempted to create a dialogue with Respondents from August of 1977 until a month prior to his active duty date when he originally filed suit.

Notwithstanding the many attempts made by Petitioner, the District Court below declined to exercise its jurisdiction determining that he had failed to exhaust his administrative remedies. When the United States Court of Appeals for the Sixth Circuit affirmed this decision and later terminated its stay against the Repondents, Petitioner surrendered himself and is now serving as a pediatrician at Minor Air Force Base, North Dakota, and is currently facing Court Martial Proceedings for his absence from military duty during the course of the civil proceedings below.

Petitioner did mail his Application to the Air Force Board for the Correction of Military Records on December 8, 1978, pursuant to 10 U.S.C. §1552, and that agency has

informed Petitioner that his case will be reviewed on June 8, 1979.

ARGUMENT

Respondents place emphasis on Schlesinger v. Councilman, 420 U.S. 738 (1975). This case, however, is not particularly suited to the concept of administrative exhaustion as it dealt with the conviction of an Army officer for selling drugs. The Court in ruling relied on Younger v. Harris, 401 U.S. 37 (1971) in finding that Capt. Councilman would suffer no harm other than those normally attendant to the resolution of his case in the military courts. The Court further found that the issue in dispute was whether or not the crime was service connected, requiring a distinct impact on military discipline, a question with which military courts have such expertise as to make their judgments indispensable for proper review. Dr. Pence is in a far different category than one already on active duty and subject to military control.

Likewise, in Noyd v. Bond, 395 U.S. 683 (1969), the petitioner was a career Air Force officer who had been convicted of refusing to obey an order. The Court found that this

officer's failure to appeal his conviction within the military had not been excused where he had at no time attempted to show that prompt and effective relief was not available. In the instant case, Dr. Pence has shown that the relief afforded under 10 U.S.C. §1552 is neither prompt or effective. The character of the injuries he is now enduring is clearly irreparable.

Under the principles of both Gusik v. Schilder, 340 U.S. 128 (1950) and McKart v. United States, 395 U.S. 185 (1969), it is clear that the blind application of the exhaustion doctrine is inequitable in this case.

CONCLUSION

For these reasons and those contained in the original Petition, a Writ of Certiorari should be granted to review the Order of the Sixth Circuit.

Respectfully submitted.

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PROOF OF SERVICE

I hereby certify that three (3) copies of Petitioner's Reply Brief have been served on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, by Express Mail, this 11th day of May, 1979.

DAVID E. CAYWOOD